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Supreme Court of the United States

October Term, 1957

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SOUND STEAMSHIP LINES, INC.,
Petitioner,

—against—

CHARLES GARDNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATUTES INVOLVED:

46 U. S. Code, Sec. 186 (Sec. 4286 of Revised Statutes of the United States) 2

28 U. S. Code, Sec. 1254 1

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No. .....

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, SOUND STEAMSHIP LINES, INC., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit.

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Third Circuit (Appendix A) has not been reported.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on March 7, 1958. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. Sec. 1254 (1).

The Statute Involved

Federal Statute (46 U. S. Code, Sec. 186) 4286 of the Revised Statutes of the United States.

Question Presented

Whether the Court below has correctly interpreted the generally and traditionally accepted Admiralty Law and the provisions of the Federal Statute, 46 U. S. Code, Sec. 186 (Sec. 4286 of the Revised Statutes of the United States) by a holding that oral conversations constitute a charter party rather than contract prerequisites which have consistently been followed by the Courts and Maritime Industry, particularly where an unjustified assumption of jurisdiction awarded damages of anticipated profits for a breach of an incomplete executory oral contract and wherein necessary mutual obligations are absent.

THIS HONORABLE COURT IS ASKED TO CONSIDER WHETHER SUCH RADICAL DEPARTURE IN EFFECT DESTROYS THE UNIFORMITY OF ADMIRALTY PRACTICE LONG ESTABLISHED, THAT CHARTER PARTIES SHALL BE CREATED BY A PRECISE UNDERSTANDING OF THE TERMS AND CONDITIONS UNDER WHICH A VESSEL SHOULD BECOME CHARTERED, INCLUDING THE MANNING, VICTUALLING, SUPPLYING AND NAVIGATING THEREOF.

Statement of Case

Meseck Steamboat Co. Inc., operated the S/S "Americana" from New York City to Atlantic Highlands for the Monmouth Park Jockey Club on a guaranteed sum of $1,300. per day from July 16, to and including August 8, 1951.

At page 230a of Sounds Appendix on appeal in the court below, respondent explains that Meseck would not charter the S/S "Americana" to him.

> "Q. And did you recommend the Meseck then to the track people? A. I did recommend the Meseck to the track people.
>
> Q. Meseck wanted to do it directly; he didn't want to charter it to you? A. He did it directly, he wouldn't charter it to me."

Prior to that time during the spring of 1951, respondent, ostensibly representing the Monmouth Park Race Track, Oceanport, N. J., came aboard Petitioner's boat the M/V "Calvert" which could carry about 1300 passengers, while she was undergoing repairs at the Bethlehem Shipyard at Staten Island, and engaged Petitioner's President and General Manager in talks about chartering the M/V "Calvert" for the purpose of transporting passengers from New York City to Atlantic Highlands enroute to the Monmouth Park Race Track for daily trips for a stipulated amount of $11,200. ($400. per day) (App. p. 81a).

Petitioner continued repairs anticipating that respondent, Gardner or his principal would pay the $11,200.00, sign a charter party with a satisfactory guarantor or have his principal sign it. The written hiring of Meseck's vessel was signed by a substantial pier concern or company which was apparently a subsidiary of the race track company.

(COPY)

(on Meseck Steamboat Co. Inc. stationery)

Atlantic Highlands Pier Co.
Red Bank, New Jersey

Dear Sirs:

This will confirm our agreement whereby you are chartering our steamer "AMERICANA" from the 16th day of July, 1951 to and including the 8th day of August, 1951, excluding Sundays and Monday, July 30, 1951, at the rate of One Thousand Three Hundred ($1,300.00) Dollars daily, payable each Monday commencing July 23, 1951 for the preceding week.

We will arrange and pay for the wharfage in New York and Brooklyn, fully man and equip the vessel. Steamer "AMERICANA" will sail from Pier 80, North River, New York City and from the foot of 69th Street, in Brooklyn, and deliver passengers at your Pier at Atlantic Highlands, N. J., Brooklyn and Pier 80, N. R., New York.

It is agreed that if by reason of fog, stress of weather, accident to steamer incapacitating same, strikes, or because the Master of said vessel may deem it dangerous or imprudent, the owners shall fail to fulfill this contract, then such failure shall not be considered a violation of contract, nor shall the owner be held liable for such failure; and that in any event, all damages for breach of charter contract on either side shall be limited to the amount of charter money above mentioned. It is also agreed between the Owner and the Charterer that if the passengers fail to board the steamer at the time of sailing specified, the Owner shall have at its option the right to proceed to the designated landing and return to the Piers mentioned above, and the Charterer shall thereby waive all claim for return of amount of charter money due.

It is also agreed and understood that the steamer "AMERICANA" may not be available on July 30. However, we agree to furnish another suitable vessel or vessels on that day.

It is further understood and agreed that we will arrange with our insurance underwriters to include coverage for your company in our public liability policies.

Very truly yours,

MESECK STEAMBOAT CO., INC.

By .....

ACCEPTED AND AGREED TO:

ATLANTIC HIGHLANDS PIER CO.
By .....

The best that can be gleaned from the contradictory and confusing testimony of both Gardner and Fuchs is that at the outset both negotiators insisted upon a written charter party. Gardner requested Fuchs to prepare such a written agreement. Fuchs agreed to draft a charter party and typed it out himself. At Gardner's request Fuchs handed the proposed charter party to Gardner. Gardner took it home with him to look it over. Gardner rejected the proposed charter party. At first, Fuchs, like Meseck, refused to do business with Gardner as a principal because he, Fuchs, had heard rumors about Gardner (App. pp. 71a to 84a).

Both the trial Judge and the Court below have ruled that whatever discussions took place on the deck of the Calvert and during the preparation of the charter party constituted an "arrangement."

As if it were a joint venture, Gardner and Fuchs worked out a plan whereby Gardner was to help Fuchs conduct the

Coast Guard drill for the purpose of obtaining a Coast Guard Certificate, by putting men aboard the vessel. Likewise, according to this plan, Gardner did loan to Fuchs chairs, life preservers and all types of equipment so that the vessel could pass the Coast Guard inspection. I'' preservers were necessary for the certificate but chairs were not necessary. Gardner had borrowed some of the gear and equipment, such as life preservers and chairs, from the S/S "Sandy Hook" whose owner was in bankruptcy, 77B, with Gardner serving as trustee for the bankrupt estate.

All went well until Gardner refused to pay the charter hire although Fuchs constantly insisted upon such payment. Gardner had no crew aboard, not even a skeleton crew. The men he loaned to Fuchs assisted Fuchs in his first attempt to have the Coast Guard conduct a Coast Guard drill. A davit broke during the drill and the Coast Guard suspended the operation. Delay was occasioned thereby.

During all this time Gardner was negotiating for another vessel. The Monmouth Race Track loaned Gardner $5,000.00 which he spent on another vessel which ended up in a ship repair yard without being put into service at the race track.

At the time of the attempted U. S. Coast Guard drill a few minor repairs were necessary. The Coast Guard did not issue a certificate. The Calvert was a dead vessel. Inasmuch as it was in the repair yard and could not leave on its own power-Mr. Fuchs hired a tug to tow it out of the yard. The next morning there was a bit of acrimony between the two negotiators and Mr. Fuchs ordered Mr. Gardner to take his men and gear off the vessel. Before night Mr. Fuchs withdrew the vessel from the negotiations which have been held to be an oral charter.

Gardner waited a year before taking any action. Then he had the vessel attached by a U. S. Marshal.

United States District Judge Modarelli ordered the vessel to be released as far as the second cause of action was concerned and ordered Sound to put up a bond as to the first cause of action. After Gardner's time had expired to appeal from the order of Judge Modarelli the trial Judge of this case directed that an order be made *nunc pro tunc* extending Gardner's time within which to appeal. On appeal to the Court below, that court ruled that the *nunc pro tunc* order was erroneous (Resp. App. p. 51a).

Another erroneous ruling by the trial Court was the allowance of interest on an unliquidated claim from July 12, 1951, as directed in Conclusion of Law No. 4.

Another erroneous ruling by the Trial Court on October 3, 1956, was the allowance of interest on an unliquidated claim from July 12, 1956.

Another erroneous ruling was when the Court allowed the interest from July 12, 1951.

Another erroneous ruling was on November 29, 1956, when the Court made an order allowing a reconsideration and clarification of the Court's rulings and denying application for dismissal of the libel as to Ernest E. Fuchs (App. pp. 14a to 28a).

Still another wholly erroneous finding was the trial Judge's judgment holding Fuchs answerable to Gardner on the theory that Fuchs, as representative of his principle violated the mythical oral charter.

Although the crux of the testimony at the trial, as far as respondents were concerned, evolved around payment of the charter money and giving of a performance bond, the trial Judge frankly admitted that he did not know what a

performance bond was. Therefore, the trial Court rejected the expert testimony of witness Schretweiser as to the purpose of a performance bond. (See excerpts from the Federal Government's charter party, App. C.)

The affirmance of the judgment by the Court below seems to be predicated upon a wholly erroneous statement in the opinion that "there is evidence that the respondent Sound had been paid at the rate of $2.00 per passenger for the round trip from New York City to Atlantic Highlands by the Monmouth Park Jockey Club, which issued a combination ticket including entrance to the race track and that in 1951 the rate would have been $2.50." This false premise coupled with the misinterpretation of Section 186, 46 U. S. C. emphasizes the injustice wrought by the affirmance which has so aggrieved the petitioner herein.

Reasons for Allowance of Writ

A. *Importance of Question Presented.*

A review by this Court as to the question presented is of great concern and importance to all shipowners of the United States, including those operating out of ports on the West Coast; shipowners with headquarters in the Gulf of Mexico; and shipping companies chartering vessels as owners from the many ports on the East Coast of the United States.

It must be said that the ruling sought to be reviewed represents such an unexplainable and drastic departure from the heretofore universally accepted statutory requirements for the chartering of a vessel that shipowners are apprehensive as to what dare be said while talking to a proposed charterer about hiring out its vessel for charter money.

The question is important because if a representative, of a racetrack, seeks to obtain a vessel for summer use for the racetrack and attempts to do the vessel owner a favor in completing the repairs and getting the vessel ready, by loaning a half a dozen men to the vice-president of the owner to conduct a coast guard drill, the Courts will construe such unrelated acts as supplying a crew for the vessel without the objection of the owner. Libelant testified that he had no crew aboard the M/V "Calvert," not even a skeleton crew, but that he loaned some men to Mr. Fuchs to conduct a Coast Guard drill. Apparently the machinations of getting a vessel ready for a Coast Guard Certificate were completely misunderstood by the Trial Court and Appellate Court below.

Of paramount importance to the Maritime Industry is the use of performance bonds which the Appellate Court completely misunderstood as is evidenced by the inference in the Opinion, that the use of an engineer of one's choosing rendered utterly useless all the customs and requirements with respect to the necessity of furnishing a performance bond in a written charter party.

Unrestrained liens against a vessel paralyzes the Maritime Industry as it is just as definite a diminution of her value as is physical damage.

By failure to provide for a performance bond and the payment of the charter fee, an owner is left absolutely helpless with no means of protecting himself.

Contrary to Admiralty custom and practice, the Court below has attempted to enforce an oral contract that makes no mention as to performance bond or to the payment of the charter money, but has awarded recovery by implying that these provisions are unnecessary, contrary to the decisions of *Jones & Laughlin Steel Corporation* v. *Vang*, 73 Fed. 2d 88, cert. den. 294 U. S. 735, where the Court said:

> "A diligent search has failed to uncover any law on a charter party by implication. All the law available to us deals with an express contract, whether written or oral, Benedict on Admiralty 4th Edition, Sec. 200. Being an express contract, it must be proved yet may be construed like any other contract. Declining to find a charter by implication, we are asked to construe the coal contract as a charter party."

The same rule was adopted in *The Severance*, 52 Fed. 916, 921, cert. den. 328 U. S. 983.

Petitioner seeks a forthright ruling by this Court to give some indication to the Maritime Industry as to what will be its holdings in the future with respect to the potential liability of shipowners in their attempts to prepare and negotiate charter parties. So destructive of the absolute reliance which has been placed on decisions and maritime customs during the years past that shipowners now have no criterion as to what talks and attendant acts, such as placing life preservers and gear aboard, and seamen, similar to a joint venture, will be construed as an oral charter party where the negotiators (Mr. Fuchs for petitioner and Mr. Gardner, for respondent for Monmouth Park Jockey Club) seek a written charter for their principals.

B. *Decisive Reasons for Allowance of Writ.*

1. The first reason for allowance of writ is that the decision in this case is so clearly erroneous that it should be reviewed by this Court as in the case of *McAllister* v. *United States*, 348 U. S. 19. The opinion states that the trial Judge's decision was not clearly erroneous.

2. Invoking admiralty jurisdiction by the trial Court and proceeding to judgment should be closely examined, where vessel was withdrawn from navigation.

3. The Appellate Court utterly failed to give adequate consideration to the crucial nature of an admiralty performance bond which under the custom of the maritime industry is given by the charterer of a vessel to the owner as part of the charter to protect the vessel herself from liens which otherwise might attach upon the vessel for unpaid seamen's wages, salvage and negligence in navigation while operated by the charterer away from the control of the owner and to protect the vessel from sale and satisfaction of such liens particularly where the trial Court held that the rejection by the charterer of a draft of the proposed charter party containing the customary bond requisite is not inconsistent with an oral contract of charter and upheld a libel by the charterer for breach of a charter party when the owner would not deliver the vessel.

4. Despite Gardner's admission that he had no charter; despite his testimony that he rejected a written agreement which he had originally insisted be made because it was made out to a corporation; and because the record is clear that the charterer did not have a crew to man the vessel, or even a skeleton crew, as required by the U. S. Coast Guard and Federal Statutes; and while the record is clear that respondent refused to read the proposed charter party, which he had insisted be prepared, the affirmance of the trial Court's invoking the jurisdiction of an Admiralty Court should be closely examined as being in conflict with the decision in *Dampskibsselkapet Danneborg* v. *Signal Oil & Gas Co.*, 310 U. S. 268, 279.

5. It is clear that Conclusion No. 2, that a parole charter existed by virtue of the arrangement agreed upon by the parties is based upon the implication that there were sufficient facts to constitute an arrangement which is diametrically opposed to the testimony of both Fuchs and Gardner.

Jones & McLaughlin Steel Corp. v. *Vang*, 73 Fed. 2d 88; *The Severance*, 92 Fed. 916, 921, cert. den. 328 U. S. 983.

6. Of the $50,885.00 awarded, $30,336.00 must be allocated to income from bar. Answer to interrogatories by libelant (Resp. App. p. 48a). This holding without any proof that respondent could or did get a liquor license from New York or New Jersey for the sale of intoxicating liquors, is alone sufficient reason for allowing a writ.

With Respect to the First Reason for Allowance of Writ—B-1.

Miscarriage of justice is indicated from the inception of the case—the *nunc pro tunc* order of the trial judge; the conduct of the trial judge during the trial; his holding Fuchs answerable to Gardner; the allowance of interest on an unliquidated claim, first from July 12, 1956 and then from July 12, 1951; holding that an "arrangement" constituted an oral charter without indicating upon which talks and conversations the Court's conclusion was predicated; and awarding damages on the basis of being deprived of profits on bar receipts when in fact there was no evidence that any authorities would issue a liquor license to Gardner.

As indicative of the trial judge's confusion and bewilderment, he handed down another decision as follows: The opinion filed herein on October 3, 1956 is amended as follows: "July 12, 1956"—line 3 on the top of page 7 should read: "July 12, 1951" (App. of Res. page 12a).

On December 5, 1956, the trial judge granted judgment which was apparently intended to correct his two former erroneous holdings. The judgment indicates that by December 5, 1956, the Trial Court decided that respondent should have interest from October 3, 1956 (App. of Res. Fuchs, page 13a).

With Respect to the Second Reason for Allowance of Writ—B-2.

At the trial the libellant completely divested an Admiralty court of its jurisdiction when he stated that he did not have a contract and that he did not have a charter party; that there was no completed Coast Guard drill; that there was no Coast Guard certificate issued; that there was no full complement of crews; that there was no full crew; that there was not even a skeleton crew; that there was no precise understanding, agreement or arrangement as to the supplying of the vessel by him; that he failed to conduct an inventory of consumable stores, such as oil and packing for the engines; that there was no precise understanding about him supplying any consumable stores or oil; that there were no talks about victualling the ship; that there was no manning of the vessel, except Captain Jenks and some four men placed aboard to help Fuchs when the Coast Guard men came aboard to conduct the first drill (App. 371a). Libelant proved by his own case and vigorously contended that the vessel was a "dead ship" within the meaning of *New Bedford Drydock* v. *Purdy*, 258 U. S. 96. *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187. Failure on the part of the negotiators to come to a meeting of the minds as to the time and place for the payment of the $11,200. charter money aborted the plans and divested the Admiralty court of jurisdiction.

Ward v. *Thompson*, 22 Howard (63 U. S.) 330, 333 (16 L. ed. 249);
Peoples Ferry Co. v. *Beers*, 20 Howard 393.

With Respect to the Third Reason for Allowance of Writ—B-3.

Perhaps it is gratuitous to attach excerpts from our government's "bareboat charter" to the application, but by

adopting this procedure an attempt is being made to present to the attention of the Court as forceably as possible the absolute necessity of a charter party which is not a unilateral contract but one binding on both parties thereto with respect to inventory, consumable stores, and fuel, maintenance, manning, insuring and bonding. By far the largest shipowner has been the United States. Its practice of requiring a written contract for the handling of a vessel by a charterer dissipates and/or neutralizes the harping of the textbook writers that oral charters are generally accepted. Neither the S/S "Americana" nor the M/V "Calvert" were harbor craft. They are vessels having a capacity of 1600 and 1300, respectively. The government, which insists on a written charter agreement, as did Fuchs and Gardner, at the inception of the discussions would never be content to have its contract considered a "memorial" of the talks, discussions or attempted arrangements as expressed by Corbin on Contracts, Section 30 (1950). Such treatise has been cited by the opinion of the court below.

With Respect to the Fourth Reason for Allowance of Writ—B-4.

All kinds of liens on a vessel may be acquired, including those of material men for supplies ordered from them by a charterer such as Gardner. In *Dampskibsselkapet Danneborg* v. *Signal Oil & Gas Co.*, 310 U. S. 268, 279, the court held that an owner must protect himself against such liens by his charter,

> "When the owner does not do so he should not be heard to complain when it appears that it is the charterers job to obtain supplies to keep the vessel on her way and the charterer has not prohibited reliance upon the credit of the vessel."

It is unconscionable for any court to enforce a so-called charter of this type where both Fuchs and Gardner insisted on a written charter party, while talks were going on on the deck of the vessel at the Bethlehem Ship Repair Yard, and finding out later when the negotiations were aborted due to circumstances, that they had accidentally made an oral charter.

With Respect to the Fifth Reason for Allowance of Writ--B-5.

If there were in fact a parole charter, the significance of it is that there must have been or should have been such an oral agreement that would be enforceable by both of the contractors. This proposition can best be urged by the inquiry as to whether there existed in the "arrangement" or the "parole agreement" any provision whatsoever by which Fuchs could have held Gardner. Looking in retrospect, if Gardner had obtained control of the M/V "Calvert," where is there one single iota of representations by Gardner with respect to the manning, victualling, and supplying the vessel, required by Section [illegible]196, and concerning which the trial court could hold Gardner responsible to Fuchs in the event of a violation. The discussions are fatally absent of any representations by Gardner upon which Fuchs could have sued him if he failed to properly navigate the vessel and take requisite precautions for the safety of 1300 patrons of the racetrack while they were aboard returning from the racetrack, having won or lost as their luck dictated. Therefore, one of the most important reasons for certiorari is to provide a vehicle by which the oral contract can be given the acid test to determine as to whether there was any provision at all enforceable by Sound as to Gardner.

FUCHS SAID HE WOULD NOT CHARTER TO GARDNER.

Q. All right. You also told him what?

The Court: You also told him what?

A. And I also told him that I would not charter the boat to him, he would have to give me the name of the party who would charter the boat, to which he replied that the race track would be interested, as that was where the boat was going to run, for the duration of the racing season of 1951.

Q. *Did you tell him you would not charter to him?* Is that right? A. That's right.

Q. And you knew of Mr. Gardner, did you not? A. I did (Resp. App. p. 70a).

Q. Now, was there any further conversation which you can tell his Honor about that took place at that time? A. Yes, he asked me if I would draw up a charter party, a bareboat charter party, showing the conditions under which I would charter the vessel to him.

Q. And what did you reply? A. I said I would go home that night and write it up myself.

Q. Did you? A. I did.

Q. How? A. On a typewriter, on stationery of the Sound Steamship Lines.

Q. Where? A. At my home.

The Court: A bareboat charter party?

The Witness: A bareboat charter party.

Q. Where did you do this typewriting? A. At my home in Bell Harbor (Resp. App. pp. 71a and 72a).

From pages 74a to 84a of Appendix is to be found evidence concerning the proposed charter which Fuchs objected to have signed by Gardner.

In re California Eastern Airways, Inc., 95 Fed. Supp. 348, it was held that a contract was never consummated by the claimant and debtor because neither claimant nor debtor consented to the terms of the agreement in the manner contemplated. This is a general rule enunciated by Williston on Contract, Sec. 28. Also whether an informal agreement which according to the understanding of the parties is to be reduced to writing takes effect as a completed contract at once or only when a formal written contract is executed depends upon the intention of the parties as construed from the facts in the particular case.

In *S. H. Kress Co.* v. *Fisher, et al.*, 65 Fed. 2d 82, the Fourth Circuit Court of Appeals ruled that where parties definitely agree that there should be no binding obligation until a formal lease had been signed and delivered the parties had not reached an agreement as to all initial terms of the contract.

In *Merchants American Marine Insurance Co.* v. *Letton* (2 Cir.), 9 Fed. 2d 799, 801, Cer. Den. 271 U. S. 668, the Court, in its opinion, said:

> "Reading the letters exchanged it is clear that the parties signify a willingness to enter into the contract, but neither considered the letters constitute such a contract. * * * ."

In *Julius Kayser & Co.* v. *Textron Inc.* (4th Cir.), 228 Fed. 2d 783, the Court said:

> "Whether or not the parties intend to be bound only by the execution of a formal instrument is a question of intent."

The Trial Court said:

> "I find that the parties did not intend to be bound until the agreement was reduced to writing and signed."

The question of a guarantor to Mr. Fuchs was very important.

In *Erlen* v. *The Brewer*, 8 Fed. Cases No. 4519 and in *Steamtug H. W. Edui*, 8 Benedict 238 the integrity of the charterer was questioned. No guarantee was furnished. There was no contract.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue as prayed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

CHARLES GARDNER,

—v.—

M/V CALVERT, Her Engines, Machinery, Tackle, Fittings, Equipment, etc., and ERNEST E. FUCHS and SOUND STEAMSHIP LINES, INC., and all Other Persons Lawfully Intervening for Their Interests.

No. 12,178, Appeal of CHARLES GARDNER.

No. 12,179, Appeal of ERNEST E. FUCHS and SOUND STEAMSHIP LINES, INC.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 10, 1957

Before:

BIGGS, *Chief Judge*, and
MARIS and McLAUGHLIN, *Circuit Judges*.

OPINION OF THE COURT

(Filed March 7, 1958)

By MARIS, *Circuit Judge*:

These cross-appeals arise out of an admiralty suit brought by the libelant, Charles Gardner, in the District

Court for the District of New Jersey against the Motor Vessel Calvert and her alleged owners, the respondents, Ernest E. Fuchs and the Sound Steamship Lines, Inc., following the alleged breach of an oral agreement to charter the Calvert. The libel asserted two causes of action. In the first, the libelant claimed the sum of $7900 for expenses incurred in hiring a crew and for the value of equipment furnished the Calvert and in the second, he claimed damages in the sum of $100,000 as a result of the respondents' breach of the charter party and withdrawal of the vessel. After a trial, the district court on October 3, 1956 filed findings of fact and conclusions of law as follows:

"Findings of Fact

"1. In July, 1951, respondent Sound Steamship Lines, Inc. was the owner of the Motor Vessel 'Calvert', and respondent Ernest E. Fuchs was president of said corporation.

"2. Beginning on July 2, 1951, libellant negotiated with respondent Fuchs with a view toward chartering the 'Calvert'. A parol charter resulted. Charter was for the purpose of transporting passengers from New York City to Atlantic Highlands en route to the Monmouth Park Race Track at Oceanport, New Jersey, for Sunday trips to Altantic Highlands, and for other stated purposes at the end of the racing season.

"3. Libellant also delivered equipment to complete the outfitting of the 'Calvert' to that ship on July 8, 1951, which respondent Fuchs took on board without protest, the evidence indicating to the court that the value of said equipment was $1,500.00.

"4. On July 8, 1951, libellant put a crew aboard the 'Calvert' without protest from respondent Fuchs.

"5. On July 10, 1951, libellant appeared with $5,000.00 as an advance ready to proceed, but respondent Fuchs failed, neglected and refused to go through with the charter agreement.

"6. Respondent Fuchs removed the vessel from its berth in New York to another in Perth Amboy, refusing to carry out the charter agreement.

"7. The equipment delivered by libellant has remained aboard the 'Calvert' and due demand for payment has been made.

"8. No attempt to pay for the equipment or to go through with the parol charter agreement has been made by respondent Fuchs, though duly demanded by libellant.

"Conclusions of Law

"1. This court has jurisdiction of the subject matter and the parties involved.

"2. A parol charter existed by virtue of the arrangement agreed upon by the parties.

"3. Respondent Fuchs accepted and agreed to pay for equipment furnished by libellant.

"4. Libellant is entitled to a decree against respondents for loss of profits from breach of charter, in the sum of $49,385.00, and for the equipment delivered by libellant aboard the 'Calvert', in the sum of $1,500.00, with interest from July 12, 1951[1] and costs of court.

"The damages have been determined in accordance with the principles set down in *Interchemical*

[1] The date "July 12, 1951" was inserted by amendment of October 5, 1956 in place of "July 12, 1956".

Corp. v. *Uncas Printing and Finishing Co.* (1956) 120 A. 2d 880, 39 N. J. Super. 318, which adopts the rule set forth in *Rynveld, et al.* v. *Depuis* (1930) 39 F. 2d 399, which latter case cites with approval a similar rule set forth in *Eastman Kodak Co.* v. *Southern Photo Material Co.* (1923) 295 F. 98, where the court said at p. 102:

> 'Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate. The defendant, whose wrongful act creates the difficulty, is not entitled to complain that the amount of the damages cannot be accurately fixed.'"

Motions were filed by the respondents for reconsideration, or for dismissal of the libel as to both respondents, or for dismissal of the libel as to the respondent Fuchs individually. These motions were denied by the district court which on December 6, 1956 entered a final judgment in favor of the libelant and against the respondents Fuchs and Sound Steamship Lines in the sum of $50,885 with interest at 4% per annum from October 3, 1956, the date on which the district court had filed its findings of fact and conclusions of law. These appeals by both parties followed.

On the respondents' appeal, Fuchs contends that the district court erred in refusing to dismiss the libel as to him individually and Sound Steamship Lines contends that the award of damages to the libelant is unsupported in the evidence. The libelant in his cross-appeal contends that the district court erred in awarding him interest at the reduced rate of 4% from October 3, 1956 only instead of at the rate of 6% from July 12, 1951, as directed in the court's amended conclusion of law No. 4. We will consider

these issues seriatim viewing, as we must, the evidence as to each issue in the light most favorable to the appellee involved.

The respondent Fuchs argues that in the light of the district court's finding of fact No. 1 that "In July, 1951, respondent Sound Steamship Lines, Inc. was the owner of the Motor Vessel 'Calvert', and respondent Ernest E. Fuchs was president of said corporation", the district court erred in refusing to dismiss the libel as to him. We think that he is right in this contention and that his motion to dismiss should have been granted. The libelant, however, argues that the respondent Fuchs should be held personally liable because he owned 100% of the stock. This, even if the premise were true, would not follow. It is a well settled rule that a corporation is for most purposes an entity distinct from its individual shareholders, *Klein* v. *Board of Supervisors*, 1930, 282 U. S. 19, 24; *New Colonial Co.* v. *Helvering*, 1934, 292 U. S. 435, 442, and only in exceptional instances may the separate corporate identity be disregarded. Furthermore it is normal for the president of a corporation to act as its chief executive officer and agent, and contracts made by a corporation's authorized agent within the scope of its legitimate purposes are binding on it. *Bank of Columbia* v. *Patterson*, 1813, 11 U. S. 299; *Chesapeake and Ohio Canal Co.* v. *Knapp*, 1835, 34 U. S. 541; Restatement, Agency, §§4, 320, 328. In the present case there was no evidence that the respondent Fuchs intended to be bound personally, or that he acted beyond the scope of his authority as president. Accordingly, he may not be held personally liable and the judgment must be reversed insofar as it holds him individually liable for the value of the equipment furnished the Calvert and for the damages flowing from the breach of contract.

The respondent Sound Steamship Lines' attack on the decree is threefold: Its first contention is that the district court erred in holding it liable in the sum of $1500 for equipment delivered to the Calvert. Little need be said in respect to this contention. Fuchs admitted in his testimony that equipment had been delivered aboard the Calvert and that it remained unpaid for. There is ample support in the record for the district court's conclusion that the respondent Sound Steamship Lines is liable for this equipment. The conclusion, accordingly, will not be disturbed.

The respondent Sound Steamship Lines' second contention is that the district court erred in finding that the parties had entered into an oral charter party. It argues that the negotiations between the parties were merely preliminary and tentative, that there was no meeting of the minds as to the terms of the contract and that they intended that the terms would finally be reduced to writing before becoming binding. The evidence discloses that on July 8, 1951, the day on which the libelant delivered equipment to the Calvert and put a crew aboard, Fuchs prepared and submitted to the libelant a form of charter party upon stationery of the respondent Sound Steamship Lines which the libelant rejected. This draft mentioned a performance bond, referred to a corporation instead of the libelant as charterer, and contained blank and unfilled spaces. Fuchs said he would redraw it to conform to their agreement. This he did not do. But the fact that the parties intended to put their agreement in writing is not necessarily inconsistent with the fact that they may have orally reached an agreement upon the terms of a contract. That parties may make a binding oral agreement is a well-settled principle in the law of admiralty. *Union Fish Co.* v. *Erickson*, 1919, 248 U. S. 308; *American Hawaiian S.S. Co.* v. *Willifuehr*, D. C. Md. 1921, 274 F. 214, aff. 280 F. 1023; *Tomkins*

Cove Stone Co. v. *Bleakley Transp. Co.*, 3 Cir., 1930, 40 F. 2d 249; *Salmons Dredging Corporation* v. *Herma*, 4 Cir. 1950, 180 F. 2d 233. The essential prerequisite to the formation of such a contract is the intention to do so, which the district court must determine from the actions of the parties and the surrounding circumstances. See the discussion by Judge Leahy in *Canister Co.* v. *National Can Corp.*, D. C. Del. 1945, 63 F. Supp. 361, 365-366, and Restatement, Contracts, §71.

As Judge Goodrich said, in speaking for this court in *Smith* v. *Onyx Oil and Chemical Company*, 1955, 218 F. 2d 104, 108:

> "Was there a contract? On this subject there are two rules which can be stated without the slightest disagreement by anyone. If the parties intend not to be bound until a written memorial is executed by each, then they are not bound until that event takes place. On the other hand, although parties may intend to put their agreement in writing, it does not follow that they have not made a contract until the writing is completed and signed. These two rules are set out in Williston on Contracts, §28 (Rev. ed., 1936), and in Corbin on Contracts, §30 (1950). The emphasis of these two eminent writers is, it seems to us, inclined toward finding the formation of a contract prior to the signing of the document unless the parties pretty clearly show that such signing is a condition precedent to legal obligation. And since contract law has passed the formalism of elaborate doctrines pertaining to sealed instruments, it seems to us such emphasis is quite natural and quite correct. . . .
>
> "As the text writers point out, the question here is one of intention of the contracting parties. Corbin is especially clear on this. He says:

'The courts are quite agreed upon general principles. The parties have power to contract as they please. They can bind themselves orally or by informal letters or telegrams if they like. On the other hand, they can maintain complete immunity from all obligation, even though they have expressed agreement orally or informally upon every detail of a complex transaction. The matter is merely one of expressed intention. If their expressions convince the court that they intended to be bound without a formal document, their contract is consummated, and the expected formal document will be nothing more than a memorial of that contract.' Corbin on Contracts, §30 (1950)."

In the present case the testimony was sharply conflicting. It is quite evident that the district court credited the libelant's witnesses and not those for the respondents. Since there is support in the evidence for the finding of the district court that an oral contract of charter was made, that finding may not be stamped as clearly erroneous and it must be affirmed. *McAllister* v. *United States*, 1954, 348 U. S. 19.

This brings us to the respondent Sound Steamship Lines' third and final contention, namely that the award of $49,385 for loss of profits is so conjectural and speculative as to be erroneous. It is settled that in establishing loss of future profits it is only the fact that some loss has resulted from the defendant's breach of contract which must be proved with certainty. Once that fact has been established the actual amount of the lost profits need not be proved with certainty but may be estimated from the facts in evidence, including the inferences to be drawn from them and the probabilities which they suggest. *Story Parchment Co.* v. *Paterson Co.*, 1931, 282 U. S. 555, 562-563; *Pal-*

mer v. *Connecticut Ry. Co.*, 1941, 311 U. S. 544, 561; *Bigelow* v. *RKO Radio Pictures*, 1946, 327 U. S. 251, 263-266; *Wakeman* v. *Wheeler & Wilson Manuf'g Co.*, 1886, 101 N. Y. 205, 209, 4 N. E. 264, 266; *Agitair Products Corp.* v. *F. C. Castelli Co.*, 3 Cir. 1952, 195 F. 2d 798. With these principles in mind we first consider whether the evidence which the libelant produced proved with reasonable certainty that he did actually suffer some loss of future profits as the result of the breach.

The libelant testified that prior to the time he negotiated for the charter of the Calvert he had been engaged in the maritime business for approximately 17 years, and that he had been connected with the Central Railroad Company of New Jersey for whom he had operated the S.S. Sandy Hook, which vessel he and others had acquired in 1947 and then had conveyed to the corporation, S.S. Sandy Hook, Inc., of which the libelant was president. Since the fall of 1949 the libelant operated the Sandy Hook as general manager for the debtor in possession under a court order issued pursuant to Chapter XI of the Bankruptcy Act. For several years prior to November 1950, when the Sandy Hook was seriously damaged, the vessel had been used from the middle of June until the end of the first week in August to transport passengers from New York City to Atlantic Highlands, New Jersey, en route to the race track operated by the Monmouth Park Jockey Club. In addition to this use, the vessel was operated to transport commuters from New York City to Atlantic Highlands during the racing season, for moonlight cruises, and for private charter parties, which libelant testified was the use he intended for the Calvert. It was certain in the middle of June, 1951, that the Sandy Hook would not be operable that season. On July 31, 1951 the corporation S.S. Sandy Hook, Inc., was adjudicated a bankrupt and a trustee was appointed. And it was between the middle of June

and early in July, 1951, that the libelant negotiated for the charter of the Calvert.

The Calvert had not been in commercial use for several years, and was, at that particular time, in drydock where a new diesel engine was being installed in her. For the uses for which the libelant intended the vessel the Calvert needed more life preservers, chairs, fire extinguishers and other equipment. Fuchs knew of its intended use for transporting the passengers bound for the race track. It appears that he himself offered to convey these passengers in the Calvert for the Monmouth Park Jockey Club at about the time of the breach. A representative of the Monmouth Park Jockey Club testified that during prior years the Sandy Hook had given the Club this service and that it intended the Calvert to be used for this purpose during the remainder of the 1951 racing season. In addition to this prospective use of the Calvert the libelant testified that there were charter parties originally arranged for the Sandy Hook for the 1951 season which had been designated for the Calvert.

The respondent Sound Steamship Lines urges that since the libelant was undertaking a new venture the possibility of profit from it was unascertainable. But we do not think that it can be said that the libelant was venturing on a new and untried business. While he was seeking to obtain another vessel it was to carry on the same business in which he had long been engaged. It was not a new venture in the sense used in the cases which the respondent cites. We conclude that there was ample evidence to support the conclusion that the libelant had suffered damage from the respondent's breach of the charter party.

We turn then to the contention that there was no basis in the evidence for determining the loss of profits upon which the district court could compute the libelant's actual damages. It has long been recognized that a party may

recover damages for the loss of anticipated profits when they result from a breach of contract. All damages resulting necessarily and directly from the breach are recoverable. *United States Trust Co.* v. *O'Brien*, 1894, 143 N. Y. 284, 287-289, 38 N. E. 266, 267. As we have seen, the rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. The trier of the facts may make a just and reasonable estimate of such damages based on relevant data and render its verdict accordingly. In such circumstances juries are allowed to act upon probable and inferential, as well as direct and positive proof. *Eastman Co.* v. *Southern Photo Co.*, 1927, 273 U. S. 359, 376-379; *Story Parchment Co.* v. *Paterson Co.*, 1931, 282 U. S. 555, 561-564; *Bigelow* v. *RKO Radio Pictures*, 1946, 327 U. S., 251, 264. In this regard it was said in *Palmer* v. *Connecticut Ry. Co.*, 1941, 311 U. S. 544, 560: "The ways compensatory damages may be proven are many. The injured party is not to be barred from a fair recovery by impossible requirements. The wrongdoer should not be mulcted, neither should he be permitted to escape under cover of a demand for nonexistent certainty." It is true, of course, that remote and speculative anticipated profits are not recoverable since there is no reasonable basis for their computation, and that an award of anticipated net profits may not rest solely upon a rough estimate.

To prove the amount of anticipated damages the libelant testified that the Sandy Hook made two round trips a day from New York to Atlantic Highlands, one trip for race track passengers and an intermediate trip for commuters, which trips he had proposed to continue with the Calvert; that the passenger capacity of the Sandy Hook was 1800, whereas the Calvert would have accommodated

1300 passengers; that a dining room and bar had been operated by a concessionaire on the Sandy Hook from whom the corporation received a designated share of the gross receipts; that he was to pay $400 a day for the charter of the Calvert and to provide $75,000 hull and machinery insurance, $250,000 protection and indemnity insurance, pay the crew and all the operating expenses, Fuchs to select an engineer whose wages were to be paid by the libelant. The charter was to begin as soon as Fuchs obtained the necessary Coast Guard certificate. There were charter parties which had originally been arranged for the Sandy Hook and which had been designated for the Calvert. There was some evidence to indicate that the income of the Sandy Hook for ticket sales for July and August, 1950, was $125,511.60; that about $16,000 was received from the dining room and bar concessionaire as 20% of the dining room receipts and 25% of the bar receipts; and that other amounts were received from charter parties. The libelant also testified as to the estimated daily cost of operating the Calvert. There was evidence that in past years an average of 800 passengers a day had been carried on the Sandy Hook during the racing season to Atlantic Highlands and that the vessel had been used for private charter parties during the summer season until Labor Day.

Martin J. Gross of the Meseck Steamboat Co., Inc., testified that Meseck operated from New York City to Atlantic Highlands for the Monmouth Park Jockey Club at a guaranteed sum of $1300 per day from Monday, July 16th to and including August 8th, 1951, using a larger vessel than the Calvert. The number of passengers transported during that period by Meseck is in the record. Gross also testified that one charter had been turned over to Meseck by the libelant for which it received $1500 and carried 969 passengers. Meseck was unable to take any

other charters, however, because it had a full schedule for the season. There was evidence that the respondent Sound Steamship Lines had been paid at the rate of $2 per passenger for the round trip from New York City to Atlantic Highlands by the Monmouth Park Jockey Club, which issued a combination ticket including entrance to the race track, and that in 1951 the rate would have been $2.50.

Upon the basis of this evidence the trial judge found the libelant's loss of profits to be $49,385. We cannot say that this finding is unreasonable or that it lacks sufficient basis in the evidence. True, it cannot be defended as mathematically demonstrable. But, as we have seen, mathematical certainty is not required in a case such as this. It is sufficient where, as here, the evidence discloses the elements of damage with indications of probable amount sufficient to provide the court or jury with the basis for a reasonable estimate of the whole loss. We accordingly conclude that the award of damages for loss of profits in the sum of $49,385 must be sustained.

One matter remains to be considered, the issue raised by the libelant on his appeal that he is entitled as a matter of right to the allowance of interest from July 12, 1951, as directed in conclusion of law No. 4 of the district court. He asserts that the court in allowing interest in its judgment only from October 3, 1956 violated the law of restitution in admiralty. For this proposition the libelant relies on *The President Madison*, 9 Cir. 1937, 91 F. 2d 835. However, that case does not support his position but is authority for the general rule, which has long been recognized, that interest may be allowed to make just compensation for losses in admiralty cases but that the award of interest depends upon the circumstances of each case and rests in the discretion of the court. *The Scotland*, 1886, 118 U. S. 507, 518-519; *The Albert Dumois*, 1900, 177 U. S. 240, 255; *The Manhattan*, 3 Cir. 1936, 85 F. 2d 427.

cert. den. 300 U. S. 654; *The Stjerneborg*, 9 Cir. 1939, 106 F. 2d 896, 898-899; *The Wright*, 2 Cir. 1940, 109 F. 2d 699, 702; *Carl Sawyer, Inc.* v. *Poor*, 5 Cir. 1950, 180 F. 2d 962, 963. See *3 Benedict on Admiralty*, 6th ed., §419; and *Annotations*, 96 A. L. R. 20; 111 A. L. R. 1300; 36 A. L. R. 2d 354, 359.

The libelant urges, however, that the principle above referred to applies only to collision cases and not to cases in which damages are awarded for breach of contract. We do not agree. Where damages are unliquidated and can only be established by litigation the application of the rule is a matter of discretion for the court dependent upon the circumstances of the case. *W. R. Grace & Co.* v. *Luckenback S.S. Co.*, D. C. E. D. Va., 1919, 258 F. 49, affirmed 4 Cir. 1920, 267 F. 676, cert. den. 254 U. S. 644. Although the district court originally indicated in its conclusion of law that it would allow interest from July 12, 1951, it had the power in the exercise of its discretion to recede from that allowance, reconsider the matter, and redetermine what was a just and equitable allowance under the circumstances. *O'Donnell Transp. Co.* v. *City of New York*, 2 Cir. 1954, 215 F. 2d 92, 94.

The libelant also contends that he is entitled as a matter of right to interest at the rate of 6% per annum, which is the legal rate of interest allowed in New Jersey, N. J. S. A. 31:1-1, and relies for this proposition upon admiralty cases in which the courts have found the application of the interest rate fixed by the state to be proper. While it may well be that 6% interest would have been a proper allowance, we cannot say that the district court erred in allowing interest at the lower rate of 4%. Section 1961, Title 28, U. S. C., provides that in a civil case interest shall be allowed on a judgment at the rate allowed by state law. However, Congress has not made the same provision in the

admiralty, in which the interest rate to be allowed on a judgment is a matter within the sound discretion of the district court. We do not find that there has been an abuse of discretion in this regard in the present case.

Accordingly, the judgment of the district court will be reversed as against the respondent Ernest E. Fuchs. As against the respondent Sound Steamship Lines, Inc., the judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,178 and 12,179

CHARLES GARDNER,

—v.—

M/V CALVERT, her engines, machinery, tackle, fittings, equipment, etc., and ERNEST E. FUCHS and SOUND STEAMSHIP LINES, INC., and all others persons lawfully intervening for their interests.

CHARLES GARDNER, Appellant in No. 12,178

ERNEST E. FUCHS and SOUND STEAMSHIP LINES, INC., Appellant in No. 12,179

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

BIGGS, *Chief Judge*, and
MARIS and MCLAUGHLIN, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed as against the respondent Ernest E. Fuchs and affirmed as against the respondent Sound Steamship Lines, Inc. Each party to bear its own costs.

By the Court,

MARIS
Circuit Judge

March 7, 1958

APPENDIX C

Excerpts from "Bareboat Charter" Agreement Used By United States for Chartering Government Owned Vessels Showing the Absolute Necessity of a Performance Bond—Clause 21

The provisions in such charters demanding hull and P & I insurance as well as the manning, victualing as well as acceptance and payment for consumable stores and fuel on board is indicative of the absolute necessity and requirement for a precise understanding and agreement as to all such items before consideration be given to the consumation of a charter agreement of any nature.

Form No. 303
SHIPSALESDEMISE

Contract No. MCc62600

(Military Sea Transportation Service)

BAREBOAT CHARTER AGREEMENT OF
WAR-BUILT DRY-CARGO VESSELS

THIS AGREEMENT, dated as of July 29, 1950, between the UNITED STATES OF AMERICA, acting by and through the DEPARTMENT OF COMMERCE (MARITIME ADMINISTRATION) (hereinafter called the "OWNER") and AMERICAN FOREIGN STEAMSHIP CORPORATION (hereinafter called the "CHARTERER"), whose address is 80 Broad Street, New York 4, New York.

WITNESSETH:

PART I

CLAUSE A. *Uniform Terms.* This Agreement consists of Part I and Part II. Unless otherwise in this Part I expressly provided, all of the provisions of said Part II shall

be a part of this Agreement as though fully set forth in this Part I. In the event of a conflict between the provisions of Parts I and II, the provisions of Part I shall govern to the extent of such conflict.

• • • • •

CLAUSE H.(2)(a) The working capital requirements prescribed in Paragraph (a)(2)(i) of said Section 299.31 shall be reduced so as to include prepaid insurance for a period of six months rather than for a period of one year.

CLAUSE H.(4) *Salvage.* Clause 19, Part II, entitled "Salvage" is hereby deleted in its entirety.

CLAUSE H.(5) *Gross Income.* Salvage earned by the Charterer shall be considered gross income as defined in Clause 23(a).

PART II

CLAUSE 1. *Condition of Vessels on Delivery.* The Vessels on their delivery shall be in Class A-1 American Bureau of Shipping or equivalent, with all required certificates, including but not limited to marine inspection certificates of the Coast Guard, Treasury Department, and so far as due diligence can make them, so, tight, staunch, strong and well and sufficiently tackled, appareled, furnished and equipped, and in every respect seaworthy and in good running condition and repair, with clean swept holds and in all respects fit for service.

CLAUSE 4. *Inventory.* A complete inventory of the Vessels' entire outfit, equipment, furniture, furnishings, appliances, spare and replacement parts and of all unbroached consumable stores, slop chest and fuel on board shall be jointly taken at the time of delivery and mutually agreed upon as to items, by representatives of the Charterer and

the Owner. Except as to broached and unbroached consumable stores, slop chest and bunker fuel, a similar joint inventory shall be taken and mutually agreed upon at redelivery. The Charterer shall take a complete inventory of all broached and unbroached consumable stores, slop chest and fuel on board at redelivery, and shall furnish the Owner with three certified copies of such inventory, priced at the current market price prevailing at the port and time of performance of Charterer's redelivery obligations, together with an affidavit certifying as to the correctness of such inventory. In event the Owner exercises its option to require redelivery at a Reserve Fleet site, the redelivery inventories above prescribed shall be taken at the port and time of performance of Charterer's redelivery obligations.

CLAUSE . *Consumable Stores and F*: The Charterer shall accept and pay for any unbroached consumable stores and fuel on board at the time of delivery at the market prices current at the port and time of delivery. The Owner shall have no obligation upon redelivery to accept or pay for consumable stores (either broached or unbroached), slop chest, or bunkers in excess of minimum amounts as established by the Owner. (Bunkers accepted by the Owner shall be paid for at the current market price prevailing at the port and time of redelivery, in event redelivery is effected at a port referred to in Clause G, Part I, or, in event of redelivery at a Reserve Fleet site, at the current market price at the port and time of redelivery repairs.) Prior to redelivery, such items shall be removed from the Vessels by the Charterer, and the fair and reasonable cost of such removal shall be charged in the Vessels' voyage accounts for the last voyage prior to redelivery. With respect to the aforesaid items, there shall be taken into account in the determination of additional charter hire, in accordance with Clause 23, Part II, (a) the current market

value thereof at the port and time of redelivery in event redelivery is effected at a port referred to in Clause G, Part I, or, in event redelivery is effected at a Reserve Fleet site, the current market value at the port and time of redelivery repairs, or (b) the net proceeds from the disposition thereof, in the event the Charterer elects to dispose of the removed goods and notifies the Owner of such intention prior to redelivery. The manner of, time and determination of net proceeds from such disposition of the items shall be subject to approval of the Owner.

CLAUSE 7. *Maintenance.* The Charterer, except as otherwise provided in Clauses 2(a) and 2(b), shall maintain the Vessels, their machinery, boilers, appurtenances, and spare parts during the period of the Vessels' use under this Agreement in good state of repair and efficient operating condition and in accordance with good commercial practices and shall keep the Vessels with full unexpired classification and other required certificates at all times, including, without limitation, unexpired marine inspection certificates of the Coast Guard, Treasury Department.

CLAUSE 10. *Charterer to man, etc.* During the period of this Agreement the Charterer shall, at its own expense, and by its own procurement, man, victual, navigate, operate, supply, fuel and, except as otherwise expressly provided in Clause 2(a) and 2(b) of this Agreement, repair the Vessels and pay all charges and expenses of every kind and nature whatsoever incident to the use and operation of the Vessels under this Agreement. The Owner reserves the right to require the removal of the Master or the Chief Engineer if it shall have reason to be dissatisfied with their conduct or if it considers their employment to be prejudicial to the interests of the United States. Except as otherwise expressly provided in this Clause and Clause 25 of this Agreement the Charterer and not the Owner shall

have exclusive possession, control and command of the Vessels during the entire period of use under this Agreement.

CLAUSE 16. *Insurance.* The Charterer shall at all times during the period of the Vessels' use under this Agreement carry and maintain on the Vessels insurance covering all marine and war risk hull and marine and war risk protection and indemnify insurances and such crew insurance as is required by applicable decisions of the Maritime War Emergency Board in such amount and in such form and with such insurance companies, underwriters or funds as the Owner may require and approve. All insurance required under the terms of this Agreement to be carried by the Charterer shall be placed and kept with responsible insurers satisfactory to the Owner, and shall include the United States of America as an assured, without right of subrogation against the United States in so far as its interest in said Vessels is concerned and without liability by the United States for assessments under any mutual form of policy. The hull and disbursement insurance on the Vessels shall be in an amount no less than the valuation set forth in Part I. The marine P & I insurance shall be in the amount of not less than $175 per gross ton, or the valuation figure set forth in Part I, whichever is higher, but not exceeding $2,000,000. The war risk P & I insurance shall be in an amount of not less than $60 per gross ton.

CLAUSE 21. *Bond.* The Charterer, at or before delivery of each vessel under this Agreement, shall furnish the Owner with a bond with sufficient surety, in the amount of $50,000 per Vessel, such bond to be approved by the Owner, both as to form and sufficiency of the sureties, and to be conditioned upon the true and faithful performance of all and singular the covenants and agreements of the Charterer

contained in this Agreement including, but not limited to, the Charterer's obligation to pay charter hire and damages and to indemnify against liens. The Charterer may, in lieu of furnishing such bond, pledge United States Government securities in the face value of the required amount under an agreement satisfactory in form and substance to the Owner.

IN WITNESS WHEREOF, the Charterer has executed this Agreement in quadruplicate the 25th day of OCTOBER, 1950, and the Owner has executed this Agreement in quadruplicate the day of , 1950.

Execution for Charterer

AMERICAN FOREIGN STEAMSHIP CORPORATION

By: F. RIKER CLARK
F. RIKER CLARK
PRESIDENT

Attest:

Morris Ginsberg
or if not incorporated

In the presence of:

.....
Witness

Execution for Owner:

UNITED STATES OF AMERICA
Department of Commerce
(Maritime Administration)

By: /s/ L. Marian

Approved as to Form:

/s/ Elvin E. Metz
Assistant General Counsel